STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 9216
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals a decision by the Department of Social Welfare (DSW) denying his request to correct an underpayment in his ANFC grant based upon his failure to verify that he had incurred rent during an eviction proceeding. DSW moves to dismiss the appeal as being untimely.

FINDINGS OF FACT[1]

1. In 1985, the petitioner, who was an ANFC recipient, rented a house for $385.00 per month on a month to month basis. At that time, he provided DSW with verification of the rental amount and he was allowed a shelter cost of $278.00 based on that verification.

2. In late 1986, the petitioner began withholding his rent due to alleged substandard conditions in the house. The petitioner used some of the funds to make essential repairs affecting habitability of the unit.

3. In May of 1987, the petitioner mentioned to his DSW worker that he was withholding rent. The worker's response was to disallow his shelter costs effective June 1,1987, which

resulted in his ANFC grant going from $426.00 to $241.00. The petitioner did not appeal that reduction believing it to be in accord with DSW policy.

4. On October 9, 1987, the petitioner's landlord commenced an eviction action by serving him with a motion to leave the premises by December 15, 1987. On January 26, 1988, the petitioner was served with a complaint and Motion to Pay rent into court by the landlord which requested a payment be made into Court "of all rent accruing during the pendency of this proceeding." It does not appear that the Court acted on that request.

5. The petitioner obtained private counsel and defended the eviction. On March 28, 1988, the landlord obtained a Judgement Order and Writ of Possession as of April 15, 1988. The Judgement Order did not refer at all to the issue of rent which may have accrued. The petitioner left the premises on April 29, 1988.

6. Shortly thereafter, the petitioner sought the advice of Vermont Legal Aid and was made aware for the first time that the department's exclusion of his shelter allowance during the time he was withholding rent may have been incorrect. On May 11, 1988, the petitioner's attorney requested correction of the underpayment.

7. After receiving no response to his request, the petitioner asked for a fair hearing on June 17, 1988. That request was apparently not forwarded to the Board but did

prompt a response from DSW on June 23, 1988, offering a correction of the underpayment from June 1, 1987, through October 31, 1987, based upon a contact with the landlord's attorney who allegedly "confirmed that rent was incurred" during that time period.

8. On June 24, 1988, in response to that request, the petitioner asked for an explanation of why the shelter allowance was not being restored for the period from November 1, 1987, through April 1988 when he continued to reside at the house. The petitioner made it clear that he was not withdrawing his request for a fair hearing until that matter was resolved.

9. On January 31, 1989, after receiving no response for six months, the petitioner again asked DSW for an explanation and added that DSW should review the eviction papers and speak with his attorneys in the eviction action if there was a question about his rent obligation during that period. He added that he could still be sued for that money. Attached was a letter from a paralegal involved in the case stating that she felt that rent was always incurred absent any statement to the contrary.

10. On April 10, 1989, DSW responded to the petitioner's letter by saying that the matter had been discussed with the landlord's attorney again and that he stated there was "no likelihood of a suit for back rent." DSW, however, gave the petitioner an opportunity to provide verification of rent incurred from November 1987 through

April of 1988 before it finalized its decision not to reverse its position. The petitioner was given a deadline of May 1.

11. On May 4, 1989, when no verification was forthcoming, DSW sent a letter to the petitioner denying his request for correction of the remainder of the underpayment "because it has not been verified that a remainder of underpayment exists."

12. On May 18, 1989, the petitioner requested a fair hearing on the denial of a "refund of an underpayment".

ORDER

The department's Motion to Dismiss is denied and the department's decision not to correct the underpayments for the period October 1987 through April 1988 is reversed.

1. MOTION TO DISMISS

The department moves to dismiss this matter because an appeal was not filed within 30 days of its Notice of Decision dated May 7, 1987, in which the petitioner's shelter costs were originally deleted from the grant. The Board's rule in effect at that time,[2] provided that: "Appeals shall not be considered by the board unless the appellant has either mailed a request for fair hearing or clearly indicated he wished to present his case to a higher authority within 30 days from the date when his grievance arose."

At issue here is a determination of the point or points at which the petitioner's grievance arose. The petitioner

clearly had a grievance as of May 7, 1987, when he received the original reduction notice. See W.A.M. ə 2218.2. As the petitioner admits he did not file an appeal of that decision, he can only survive a motion to dismiss if there was another time at which a grievance arose in this matter.

The petitioner has a right under the state and federal regulations and federal law to have an underpayment of assistance which results from department error promptly corrected upon discovery of that error. See W.A.M. ə 2234.2, 45 C.F.R. ə 233.20(a)(13)(ii), and 42 U.S.C. ə 602(a)(22). The department does not dispute that proposition and in fact took steps to carry out that mandate in this case (although in a less than prompt fashion) when the error was brought to its attention by the petitioner.

The department's failure to make a requested correction or to make only a partial correction is a new decision which affects the petitioner's benefits. As such, it must be concluded that a grievance also arises when the department either acts or fails to act on a request for correction of an underpayment due to its error even though the underpayment was the result of a prior erroneous decision which could have itself been appealed. To hold otherwise is to hold that decisions regarding requests for underpayment corrections themselves are essentially unreviewable, a result which is certainly not contemplated by 3 V.S.A. ə 3091(a) which gives a recipient of benefits the right to

request a fair hearing because he has been denied benefits or because his claim is "not acted upon with reasonable promptness." Similarly, there is nothing in the federal law which supports the non-reviewability of overpayment decisions. On the contrary, the statutory language makes it clear that underpayments must be corrected at any time, not just when they occur and even if the appellant is no longer even a recipient of benefits. See Edwards v. McMahon, 834 F2d 796 (1987) and Tambe v. Bowen, 839 F2d 108 (1988). If underpayments must be corrected at any time, then it follows that an appeal is timely if it follows within 30 (now 90 days) of the time such correction is acted upon. Therefore, it must be concluded that the department's response (or lack of it) to a request for a correction creates a new grievance which is subject to the appeal limits.

The facts in this case show that the petitioner did, indeed, appeal the department's decision in the underpayment recovery request on several occasions, starting with an appeal five days before the decision was issued on the promptness issue, which appeal was explicitly continued throughout the course of the communications, and ending with the renewal of that appeal 14 days after the final decision on May 4, 1989. There can be little doubt that the department knew well within the 30 day (and later 90 day), appeal period that the petitioner sought review of its decision. The petitioner's appeal of the department's decision regarding correction of an underpayment is timely

and the department's motion to dismiss is not be granted.

2. MERITS

There is no dispute between the parties that housing expenses need not be paid but only "incurred" to be included in the grant. See W.A.M. ə 2245.3. Persons who are withholding their rent to correct defective conditions are still entitled to receive a shelter allowance as long as the rent continues to be "incurred". The department is required by regulations to verify "housing costs incurred" through a "written entry in the case record of third-party or documentary confirmation of facts stated by an applicant" at the time of initial application and "when the recipient reports that his or her circumstances relating to that item have changed or when the department receives information from some other source which indicates that the most recent information reported by the recipient may not be correct." W.A.M. ə 2211.3

In this matter, the department had a verification on file of the amount of rent charged for the house by the landlord and had no difficulty finding that the petitioner had incurred rent for that period of time he was withholding prior to the initiation of the eviction action. Thereafter, some uncertainty arose in the worker's mind as to whether the petitioner continued to have a rental obligation following a discussion with the landlord's attorney. The contents of that discussion were not revealed at hearing and the department has never fully explained its reasoning in

this matter. However, it does not appear that the information provided was that the landlord had, in fact, released the petitioner from his rental obligation. The litigation pleadings provided to the department clearly show that after October of 1988, the landlord was still seeking to recover rent. Rather, the department's initial decision appears to be based on a telephone statement or inference made by the landlord's attorney that either the rental obligation was extinguished by law or that the landlord did not intend to pursue an action to collect back rent. The petitioner met that concern with a letter from both the paralegal involved in his eviction action and his Vermont Legal Aid attorney stating that the rent was still incurred and that the landlord had a legal right to attempt to recover it.

The department explains in its brief that verification was requested from the petitioner because of the conflicting opinions of the landlord's and petitioner's legal representatives. That being the case, the petitioner was, in essence, not being asked to verify any further facts regarding his shelter costs but rather to get a legal opinion as to his obligation to pay rent during an eviction proceeding.

There is no obligation under the verification regulation to provide opinions on the legal status of obligations. The regulations plainly state that verification exists for the confirmation of facts. See

W.A.M. § 2211.3, supra. If the department is in need of a legal opinion, it has its own legal staff which can provide that information based on the facts provided by the petitioner. In this case, the petitioner had provided the department originally with a verification of the amount of his rent, had provided copies of the eviction proceedings and provided proof that he had been advised by his attorney that he was still incurring a rental obligation while he lived there. That being the case, there was nothing more the petitioner could reasonably be expected to provide which would give the department any further help in making its decision.[3]

The department had sufficient evidence to make its decision in this matter. The evidence shows that the landlord never actually released the petitioner from his rental obligation or waived his right to collect back rent.[4] The department has not pointed to anything in the law or statutes governing landlord-tenant actions which shows an extinguishment of a rental obligation by operation of law. On the contrary, the statute at 12 V.S.A. § 4761, et. seq. specifically provide for the payment of rent into court on motion during the pendency of the proceeding. It can only be concluded, based on the facts and law before the department, that the petitioner's rental obligation continued until he moved out of the premises. Therefore, he must be found to have been underpaid from October of 1987

through April of 1988.

FOOTNOTES

[1]The parties agreed that subsequent to the close of the hearing, additional evidence might be submitted if both parties agreed. The petitioner objected to inter-office transmittals offered by the department dated 6/22/88 and 8/24/88 so they are not being considered part of the record. All other documents are part of the evidence.

[2]On September 1, 1988, the board amended its rule to extend the appeal period from 30 to 90 days with regard to decisions made by the Department of Social Welfare.

[3]The department did not specify what form the verification should take. If the department expected the petitioner to get a new statement from his former landlord with whom he had recently been in a highly adversarial relationship during the lawsuit, it was clearly expecting the impossible.

[4]No inference can be drawn about this obligation from the absence in the eviction order of a reference to rent.

# # #